SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71 - 165

JESS RAYMOND BRIDWELL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1971, TERM

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL E. PAULDINO, a/k/a Mike Parker, and JESS RAYMOND BRIDWELL, a/k/a Ray Bradley, Defendants-Appellants.	Nos. 332-70 333-70

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(District Court No. 69-CR-112)

Charles F. Brega, Denver, Colorado, for Appellants.

James A. Clark, Special Assistant United States Attorney, Denver, Colorado, (James L. Treece, United States Attorney, Denver, Colorado) for Appellee.

Before BREITENSTEIN and HILL, United States Circuit Judges, and LANGLEY, United States District Judge.

HILL, Circuit Judge.

Appellants Bridwell and Pauldino were convicted by a jury on an indictment charging them with violating 18 U.S.C. §1952 by traveling in interstate commerce to Nebraska with intent to participate in illegal gambling in the prohibited modes and with actual performance of those acts. Bridwell and Pauldino take this direct appeal from their respective convictions.

In brief, the evidence, taken as we must in the light most favorable to the prosecution, 1/ shows that about November 2, 1966, appellants traveled from Colorado to Nebraska where they were joined by two individuals named Dan Abbott and Roy O'Neal. The group set out to contact one Ray Flanagan, a livestock dealer in Albion, Nebraska. Initially appellants, using alias names, engaged Flanagan in a discussion about buying livestock. Apparently, in no time the conversation turned to rolling dice to see who would buy some liquor so that the group could have a drink together.

There was a dispute in the testimony whether the dice were produced by someone in appellants' group or whether Flanagan had the dice on his desk in the sales barn. At any rate, that one roll of the dice led to a game of craps. Several hours later, Flanagan's wife discovered the game going on in the sales barn and at that point the parties retreated to appellants' motel room to continue shooting craps into the evening. At one point, one of Flanagan's friends joined the game,

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1/ United States v. Mecham, 422 F.2d 838 (10th Cir. 1970); Collins v. United States, 383 F.2d 296 (10th Cir. 1967).

but upon quickly losing several hundred dollars, he dropped out. Predictably, when the day's activities were totalled up, Flanagan lost some $8,400.

The government also introduced evidence tending to show that appellants were engaged in gambling as a business enterprise and that their trip to Nebraska was made with intent to pursue this activity. In this respect, O'Neal testified for the government to the effect that O'Neal had called Bridwell in Colorado and asked him to come to Nebraska because they "might find some gambling or something." Furthermore, O'Neal stated that Bridwell gave him several hundred dollars of the money won off Flanagan for "calling him [Bridwell] up there."

There was also testimony from an FBI agent about an incident in 1966 wherein Pauldino described himself as a professional gambler. Another agent testified that as far back as 1953 Bridwell claimed that he made his livelihood from gambling. Several other witnesses took the stand to testify about appellants' gambling activities just prior to and after the incident in Nebraska. Their testimony describes a craps game in Nevada in September, 1966, wherein appellants won some $30,000; a blackjack game in an airplane between Seattle and Portland in May, 1966, wherein appellants won some $1,200; and a card game in Canada in November, 1967, where appellant Bridwell, operating alone, won a considerable sum. Finally, as evidence that appellants were engaged in gambling as a business, their respective 1966 income tax returns were entered into evidence because each appellant

had therein described his occupation as "gambler".

Appellants primarily argue on appeal that the evidence was insufficient in three respects to prove a violation of 18 U.S.C. §1952: (1) The evidence did not show a "business enterprise" as the term is defined in the statute; (2) the government failed to establish that appellants traveled interstate with the requisite intent; and (3) the evidence failed to establish that they conducted the unlawful activity in all of the prohibited modes listed conjunctively in the indictment.

On the question of whether there was evidence that appellants were involved in a gambling business enterprise, it must be noted that §1952 makes it a crime to travel interstate to participate in unlawful activities, including gambling, only when those unlawful activities amount to a business enterprise. Obviously the anti-racketeering statute is not aimed at the fellow who, in a single instance, engages in gambling. Rather, the purpose of the statute is to get at those who engage in illegal gambling as a business and who utilize facilities of interstate commerce in furtherance of this business, thereby remaining effectively beyond the reach of state authorities. 2/

As we understand appellants' argument, they contend that under the language of §1952 their activities in Nebraska alone must

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2/ United States Code, Cong. and Admin. News (1961), pp. 2664-7; see Rewis v. United States, ____ U.S. ____ (1971).

constitute a business enterprise in that state before a violation of the statute occurs. On this premise, appellants take refuge in the fact that the government's evidence only showed that they participated in one gambling incident in Nebraska, that being when they shot craps with Flanagan. Appellants conclude that proof of the lone incident does not show that they were involved in the business of gambling in Nebraska.

The reading of the statute which appellants propose is not supported by the cases they rely upon. In fact, no reported case has come to our attention which is authority directly on the issue posed. However, from the plain words of the statute, it is our determination that the government's evidence in this case was sufficient to prove a business enterprise within the purview of §1952. Representative of the evidence establishing this were appellants' respective tax returns for 1966 which acknowledged gambling as each's occupation. In addition, there was a wealth of undisputed testimony concerning appellants' gambling forays across the country, even extending into Canada. Suffice it to say that it was well established that appellants' trip to Nebraska was not an isolated gambling incident but was just one more roll of the dice in their continuing effort to fleece the lambs of the land. Appellants' gambling was well within the clear meaning of a business enterprise involving gambling as that phrase is used in §1952. 3/

3/ Cf. Spinelli v. United States, 382 F.2d 871 at 889 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1969).

Next appellants contend that the government failed to prove that they traveled to Nebraska with the requisite intent. The argument is that the evidence shows that appellants traveled to Nebraska in search of livestock to purchase, and the subsequent gambling was merely a spur of the moment thing which was not an immediate purpose of the trip. While there was evidence that when appellants first met Flanagan they talked to him about purchasing some livestock, there was also testimony from O'Neal that O'Neal called Bridwell in Colorado and encouraged Bridwell to meet O'Neal in Nebraska to find some gambling. O'Neal's testimony also indicated that after the craps game with Flanagan, O'Neal received "courtesy money" from Bridwell as sort of a finder's fee for getting Bridwell into a game of craps. This evidence, together with the natural inferences that may be drawn therefrom, provided a sufficient basis for the jury to find that appellants traveled to Nebraska with the primary intent to engage in gambling as prohibited in §1952.

Appellants also believe that the evidence was insufficient because the government's case did not prove every point in the indictment which charged appellants with traveling interstate "with intent to promote, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity." As is apparent, the indictment charged appellants in the conjunctive while the statute reads in the disjunctive. However we do not believe that the government's proof of some but perhaps not all of the prohibited modes of violating the statute constitutes a

fatal defect in appellants' conviction. It is settled that where a crime denounced disjunctively in the statute is charged in the conjunctive, proof of any one of the allegations will sustain a conviction. 4/

We now turn to appellants' contentions concerning the admissibility of certain evidence. First, appellants object that their respective tax returns for 1966 were admitted into evidence although there was no showing by the government that the government had complied with 26 C.F.R. §301.6103(a)-1(h). The regulation in question governs the use of tax returns in litigation and requires that a United States Attorney seeking to use a return in litigation not involving revenue laws shall make written application for the return or copies thereof with the Commissioner of Internal Revenue. Appellants urge that the government's failure to prove conformity with the regulation is fatal error.

We find no prejudicial error resulting from the government's use of the tax returns. Even assuming that in fact the application was not made in conformity with the regulation, it is difficult to say that for this reason alone the returns were not admissible as evidence. The regulation in question appears to be an administrative procedure and is in no way related to

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4/ McGriff v. United States, 408 F.2d 333 (9th Cir. 1969); Rimerman v. United States, 374 F.2d 251 (8th Cir. 1967); Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963).

evidentiary rules governing the admissibility of evidence. The probative value of the returns as evidence in a courtroom is neither enhanced nor diminished by compliance with the regulation. We cannot conclude that otherwise admissible tax returns became inadmissible simply because the government did not bother to show in its case that, indeed, written application had been made to use the returns.

Appellants further argue that it was error to admit the returns into evidence because, according to appellants, the jury may have inferred tax evasion due to the fact that the income reported on their returns was at odds with the evidence of their gambling winnings in 1966. While it is true that in certain cases such as South v. United States, 368 F.2d 202 (5th Cir. 1968) evidence is inadmissible if it tends to prove an unrelated offense this case does not fall into that category. In South v. United States, supra, tax returns were admitted in a §1952 prosecution solely to show the accused's reported income. From the accused's nominal reported income, which was manifestly too small to live on, the government sought to argue that the accused must have had additional unreported income from illegal gambling sources. The court in South, in a well reasoned opinion, determined that proof of the accused's meager reported income was probative of nothing related to the gambling offense in question. But the tax returns, coupled with the prosecutor's remarks, were highly suggestive of tax evasion although that was not an offense being tried.

Our case is in a significantly different

posture. Beyond the fact that appellants did not object to the admission of the tax returns at trial, Bridwell and Pauldino's returns were admitted solely to show that on appellants' respective 1966 returns each claimed that his occupation was gambling. Income reported on their returns was not referred to at trial, and in fact the reported incomes on the exhibits were not insubstantial so as to immediately suggest tax evasion. In summary, the tax returns were probative evidence on the issues tried, and unlike the situation in South, no intimation was made to the jury that appellants were at least guilty of tax evasion. Hence it is unreasonable to assume that the jury improperly used the evidence in coming to their guilty verdict.

In a similar vein, appellants raise a question whether it was proper to admit the testimony concerning their gambling activities prior to and after their Nebraska trip. While, as we have indicated above, evidence of illegal activities other than the ones charged is not ordinarily admissible, there is an exception if the evidence establishes a course of conduct, scheme, design or intent. 5/ In this regard, we think there is no question but that the evidence had probative value as proof that appellants were engaged in gambling as a continuous enterprise. The trial judge instructed the jury that they should consider the evidence

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5/ Havelock v. United States, 427 F.2d 987 (10th Cir. 1970); United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969).

only for resolving the question of whether appellants were engaged in gambling as a business. The evidence was properly admitted. 6/

Tacking a different course, appellants also object to the testimony about their gambling activities outside Nebraska as contrary to the trial court's pre-trial order that neither appellant's criminal record should be brought out in the government's case. Appellants now contend that the evidence concerning their gambling activities outside Nebraska was tantamount to evidence of their prior criminal records. Appellants' contention is specious. The evidence in this case made no mention of appellants' criminal records, nor is this case comparable to cases where, for instance, mug shots were introduced which indirectly, if not directly, inferred the accused's previous trouble with the police. Our reading of the record discloses no subterfuge resorted to by the prosecution to inform the jury that appellants had police records. 7/

Further argument is made that it was error to admit the FBI agent's testimony that as far back as 1953 Bridwell was a gambler. Appellants urge that the remoteness in time from the charged offense negates the probative value of this evidence. If there be error in this respect, it staggers the imagination to believe

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6/ See Collins v. United States, supra.

7/ Cf. Dillon v. United States, 391 F.2d 433 (10th Cir. 1968).

that this bit of testimony in the course of the whole trial had any substantial influence on the jury's verdict. Only errors which affect substantial rights are prejudicial and require reversal. 8/

It is argued that the trial court erred in failing to grant appellants' motion for severance. As previously indicated, at trial the government produced extensive testimony concerning Bridwell's gambling activities in Canada. Pauldino was not involved in those activities, and he believes that nevertheless the jury may have considered that evidence as proof of his guilt. We are not persuaded by this argument. It is well settled that there is nothing per se improper about admitting evidence relating to one co-defendant but not relating to other co-defendants. 9/ In view of the trial court's cautionary instruction that the evidence was applicable only to Bridwell and not applicable to Pauldino, we do not believe that its admission prejudiced Pauldino in the eyes of the jurors. The evidence was presented merely to establish Bridwell's gambling occupation and to support the other evidence that the trip to Nebraska was for the purpose of gambling and not for the purpose of buying livestock. There was already a wealth of evidence establishing the same facts concerning Pauldino. In sum we are not convinced

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8/ Havelock v. United States, supra.

9/ Opper v. United States, 348 U.S. 84 (1954); Dillon v. United States, supra.

this evidence was misused by the jurors and influenced them in reaching their verdict against Pauldino. Hence we can find no clear abuse of discretion in denying separate trials.

We now turn to the contention that there was no evidence that Pauldino traveled to Nebraska with intent to engage in gambling. Without question, there was no direct evidence proving either Bridwell or Pauldino's intent when they made the trip. However, the circumstances of O'Neal's call to Bridwell and the payoff to O'Neal are grounds to infer Bridwell's requisite intent. Further evidence connecting Pauldino with Bridwell in other gambling escapades, plus Pauldino's acknowledged sole occupation as a gambler, provides sufficient circumstantial evidence of Pauldino's intent in traveling to Nebraska. The conduct of Pauldino within a reasonable time before and after the trip are circumstances which the jury could rightly consider in determining intent, motive or purpose. 10/

Lastly, appellants submit that it was error to allow the witnesses who testified about the gambling episodes in Washington and Canada to further testify that appellants cheated on those occasions. Appellants complain that the evidence of whether they cheated was irrelevant to the charge and highly prejudicial. Having closely read the record,

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10/ Brooks v. United States, 309 F.2d 580 (10th Cir. 1962).

we believe that the evidence of cheating on those occasions tied in with the testimony that in their game with Flanagan, appellants never bet against each other and would always bet against Flanagan and his friend. In short, the evidence showed all the more clearly that appellants were professional gamblers and that the Nebraska incident was just a typical episode in their larger effort to make a livelihood from illegal gambling throughout the country.

Affirmed.

APPENDIX B

MAY TERM - JULY 1, 1971

Before Honorable Jean S. Breitenstein, and Honorable Delmas C. Hill, Circuit Judges; and Honorable Edwin Langley, District Judge.

UNITED STATES OF AMERICA,	]	
	]	
Plaintiff-Appellee,	]	
	]	
v.	]	No. 333-70
	]	
JESS RAYMOND BRIDWELL, aka Ray Bradley,	]	
	]	
Defendant-Appellant.	]	

Upon consideration of petition of appellant for rehearing, it is ordered that said petition be and is hereby denied.

APPENDIX C

MAY TERM - JULY 1, 1971

Before Honorable David T. Lewis, Chief Judge; and Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges.

UNITED STATES OF AMERICA,	]	
	]	
Plaintiff-Appellee,	]	
	]	
v.	]	No. 333-70
	]	
JESS RAYMOND BRIDWELL, aka Ray Bradley,	]	
	]	
Defendant-Appellant.	]	

Upon consideration of petition of appellant for rehearing en banc, it is ordered that said petition be and is hereby denied.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

JESS RAYMOND BRIDWELL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

JESS RAYMOND BRIDWELL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, JESS RAYMOND BRIDWELL, hereby petitions that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the conviction of Petitioner for interstate travel in aid of a racketeering enterprise in violation

of 18 U.S.C. §1952.

OPINION BELOW

The opinion below has not yet been reported. An advance copy of the Opinion is appended hereto in the Appendix.

JURISDICTION

The Opinion rendered by the Tenth Circuit Court of Appeals which the Petitioner seeks to have reviewed was filed on June 4, 1971. An order denying a Petition for Rehearing was entered on July 1, 1971. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question in 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can a conviction under 18 U.S.C. §1952 be based on a single trip across a state line, followed by a dice game?

2. Must the unlawful activity (illegal business enterprise) necessary to sustain conviction under 18 U.S.C. §1952 occur in the state alleged in the indictment?

3. If the unlawful activity (illegal business enterprise) necessary for conviction

under 18 U.S.C. §1952 can be shown to have occurred in states other than alleged in the indictment, must the evidence show that the unlawful activity relied upon was illegal under the laws of the state in which they occurred?

4. Can the government introduce into evidence tax returns of a Defendant in a criminal trial without complying with 26 C.F.R. §301.6103 (a-1)h?

5. This Petitioner incorporates questions presented by Co-Petitioner, MICHAEL E. PAULDINO, whose Petition is due August 30, 1971. .

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Title 18 U S.C. §1952, the essential parts of which are as follows:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --
>
> . . . .
>
> . . . .
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined . . .

(b) As used in this action "unlawful activity" means (1) any business enterprise involving gambling, liquor on which federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States . . . :

2. 26 C.F.R. §301.6103(a)-1(h), which provides in part:

Use of Returns. Returns made in respect of any tax described in paragraph (a)(2) of this Section, or copies thereof, may be furnished by the Secretary or the Commissioner or the Delegate of either to a United States Attorney or an Attorney of the Department of Justice for official use in proceedings before a United States Grand Jury or in litigation in any court, if the United States is interested in a result, or for the use in preparation for such proceedings or litigation. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Returns or copies thereof will be furnished without written application therefor to the United States Attorneys and Attorneys of the Department of Justice for official use in the prosecution of claims and demands by, and offenses against, the United States, or the defense of claims and demands against the United States or officers or employees thereof, in cases arising under the Internal Revenue Laws or related statutes which were referred by the Department of the Treasury to the

> Department of Justice for such prosecution or defense. In all other cases, written application for a Return or copies thereof shall be made through the Commissioner of Internal Revenue, Washington 25, D.C., or where it is desired that a return or copies thereof be furnished by the Internal Revenue Officer (District Director or Director of Internal Operations) with whom the Return was filed, the applications shall be made to such officer. The application shall be signed by the United States Attorney if the Return or copy is for his use, or by the Attorney General, the Deputy Attorney General, or an assistant Attorney General if the Return or copy is for the use of an Attorney of the Department of Justice . . . .

STATEMENT OF THE CASE

On April 4, 1969, the Petitioner was indicted for acts alleged to have occurred in Nebraska on or about November 1, 1966, in violation of 18 U.S.C. §1952. A Bill of Particulars filed by the government stated that both Defendants traveled from Denver, Colorado, to Omaha and Albion, Nebraska, on or about November 1, 1966, to promote, manage, establish and carry on unlawful activity, namely, a business enterprise involving gambling in violation of certain Nebraska gambling statutes.

The Petitioner, Co-Defendant and certain other individuals traveled to Albion, Nebraska, and looked at some livestock at a sales barn. Thereafter they rolled the sales barn owner's dice with him to see who would pay for some

liquor. A crap game ensued which involved the Petitioner, Co-Defendant and some of the local residents. The evidence showed that Petitioner traveled from Denver to Albion prior to the dice game. This was the only gambling activity shown to have taken place in Nebraska. An FBI agent testified that Petitioner's Co-Defendant admitted to a Colorado jury in 1966 that he was a professional gambler. Another FBI agent testified that in Colorado in 1953 Petitioner admitted to being a gambler. The Income Tax Returns of Petitioner and his Co-Defendant were introduced which showed that their occupations were gambling. A gambling casino owner from Elko, Nevada, testified that Petitioner and his Co-Defendant had gambled in his casino in September of 1966. Thereafter, testimony was introduced from a passenger on an airliner, a construction company owner from Canada and a Royal Canadian Mounted Police Officer. This testimony was to the effect that Petitioner had engaged in card games on an airliner and in Canada and had won money by cheating. There was also testimony that Petitioner possessed marked cards and loaded dice when he was in Canada.

It was upon this state of the evidence, that the Petitioner was convicted. The Tenth Circuit affirmed that conviction, holding that the unlawful activity, namely, an illegal business enterprise involving gambling, need not have occurred in Nebraska as alleged in the indictment. The Court stated that it could find no case directly on point. (Opinion Page 5)

The Tenth Circuit also held that no prejudicial error occurred from the government's

use of tax returns. The Court stated "the probative value of the returns as evidence in a Court Room is neither enhanced nor diminished by compliance with the regulation." . . . (Opinion Page 8)

REASONS FOR GRANTING THE WRIT

POINT I.

A CONVICTION UNDER TITLE 18 U.S.C. §1952 CANNOT BE BASED ON A SINGLE TRIP ACROSS A STATE LINE, AND A SHOWING THAT A DEFENDANT PARTICIPATED IN A SINGLE DICE GAME.

POINT II.

THE UNLAWFUL ACTIVITY (ILLEGAL BUSINESS ENTERPRISE) NECESSARY TO SUSTAIN CONVICTION UNDER 18 U.S.C. §1952 MUST OCCUR IN THE STATE ALLEGED IN THE INDICTMENT.

POINT III.

IF THE UNLAWFUL ACTIVITY (ILLEGAL BUSINESS ENTERPRISE) NECESSARY FOR CONVICTION UNDER 18 U.S.C. §1952 CAN BE SHOWN TO HAVE OCCURRED IN STATES OTHER THAN ALLEGED IN THE INDICTMENT, THE EVIDENCE MUST SHOW THAT THE UNLAWFUL ACTIVITY RELIED UPON WAS ILLEGAL UNDER THE LAWS OF THE STATE IN WHICH THEY OCCURRED.

The Court of Appeals for the Tenth Circuit in the case presently under consideration held that the Petitioner violated 18 U.S.C. §1952 by traveling to Nebraska on one occasion and engaging in a dice game while there. The Court relied on the evidence the government offered that the Petitioner was a professional gambler, in effect holding that a gambler who crosses a state line and engages in a single act of gambling in that state violates 18 U.S.C. §1952. This seems to be in conflict with the decision of the Fifth Circuit Court of Appeals in the case of Rewis v. United States, 418 F.2d. 1218 (5 Cir. 1969), Rev'd on other grounds. 400 U.S. 818, 91 S. Ct. 1056 (1971), and U.S. v. Hawthorne, 356 F.2d 740 (4th Cir. 1966) Cert. denied, 384 U.S. 908. In the Rewis Case, the Fifth Circuit held that interstate gamblers crossing state lines to place bets in a gambling establishment, which was operated in violation of the laws in the state where it was located, did not violate Section 1952. The Court said:

> ". . . We do not believe that the patronizing by interstate gamblers of a gambling establishment fits within the terminology of 'promote, manage, establish, carry on, or facilitate the promotion, management, establishment, carrying on of any unlawful activity.'
>
> "We conclude that the convictions against Fuller and Nightengale cannot stand because there was insufficient evidence to show that they were other than participants in placing bets at the Williams establishment, and, as such, they could not have been found by the jury to have been guilty of any overt act

prohibited by the Federal Statute." 418 F.2d. 1218, 1221 (5th Cir. 1969)

The Supreme Court of the United States commented upon that portion of the Fifth Circuit Decision reversing the conviction of the patron of a gambling establishment saying:

> "We agree with the Court of Appeals that it cannot be said with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act. But we are also unable to conclude that conducting a gambling operation frequented by out-of-state betters, by itself, violates the Act. Section 1952, prohibits interstate travel with intent to 'promote, manage, establish, carry on or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. Legislative history of the act is limited, but does reveal that Section 1952 was aimed primarily at organized crime, and, more specifically, at persons who reside in one state while operating or managing illegal activities located in another . . . . "

Rewis v. U.S., 400 U.S. 818, 91 S.Ct. 1056 (1971) (Footnotes omitted). Reversed on other grounds.

In Hawthorne supra, it was found not to be the intent of the statute to make it a crime per se

for a person who operates a gambling establishment to travel interstate.

Considering the above cases it appears that there is a conflict of authority between Circuits on what must be shown to constitute a violation of 18 U.S.C. §1952.

Other Federal Courts have held that the business enterprise must be of a continuing nature. The Second Circuit Court of Appeals in United States v. Brennan, 394 F.2d. 151 (2nd Cir. 1968), Cert. denied, 393 U.S. 839, held that a dice game operated on a boat traveling from New York to New Jersey constituted a business enterprise, as it was held four or five times a week with a large number of participants each time. The Court felt that the regularity of the game, its location, size, and operation all were of such a continuing nature that a business enterprise was involved. In the case of United States v. Teemer, 214 F. Sup. 952 (D.C.W.V.A. 1963), the Federal District Court held that Section 1952 was intended to attack entrenched operations rather than sporadic games of chance. Apparently the Tenth Circuit is then in conflict with the Second Circuit Court of Appeals, since in Petitioner's case a single dice game was sufficient basis for Petitioner's conviction. Further, the Eighth Circuit Court of Appeals has apparently held that a continuing course of activity in the state where the alleged violation occurred is required. In Spinelli v. U.S., 382 F.2d. 871 (8 Cir., 1967), Reversed on other grounds, 393 U.S. 410 (1969), the Eighth Circuit said:

> "The evidence indicates that Spinelli was not a casual offender engaging in a

> Friday Night game of cards with some friends in Missouri. He was a racketeer committing regular and significant violations of the Missouri Law. He made regular and repeated trips across the state line, over a long period of time was involved in a very substantial gambling business. The prosecuting officials did not abuse the powers of bringing charges against Spinelli and the Trial Court properly sustained the validity of the charge." 382 F.2d 871, 890 (8 Cir. 1967)

Additionally, it is important that Certiorari be granted in this case to review the holding that evidence of gambling activities, other than those alleged in the indictment to have occurred in Nebraska, were admissible. The Ninth Circuit Court of Appeals in Turf Center, Inc. v. United States, 325 F.2d. 793 (9 Cir. 1963), held that an allegation concerning gambling in a charge under 18 U.S.C. §1952 has to be looked at in the light of the terms of the statute, and that the statute requires that such gambling has to be in violation of the state in which the gambling occurred. In Petitioner's case the evidence that was offered by the prosecution concerning other gambling activities of Petitioner were not shown to be in violation of the laws of the states in which they occurred, and therefore under the terms of the statute this should not have been considered. The legislative history seems to conflict with the decision of the Tenth Circuit in Petitioner's case. The "Sectional analysis" as provided by the Judiciary Committee of the United States in reporting out the legislative bill which became Section 1952 stated:

> "The use of the term 'business enterprise' requires that the activity be a continuous course of conduct. Thus, individual or isolated violations would not come within the scope of this bill since they do not constitute a continuous course of conduct so as to be a business enterprise." U.S. Code Congressional Administrative News (1961) P. 2666.

As stated in Spinelli supra, Congress defined "illegal activity" to mean, among other things, "any business enterprise involving gambling . . . in violation of the laws of the state in which [it was] committed." (P. 879)

The Court's admission of testimony that Petitioner was a prolific gambler and a cheater was contrary to protection afforded defendants in many other circuits and in this Court. Brinegar v. U.S., 338 U.S. 160 (1949); Barnes v. U.S., 365 F.2d 509 (D.C. Cir. 1966); Hurst v. U.S., 337 F.2d 678 (5th Cir. 1964); Boyd v. U.S., 142 U.S. 450 (1892); Lovely v. U.S., 169 F.2d 386 (4th Cir. 1948); and Hartman v. U.S., 215 F.2d 386 (8th Cir. 1954).

The Petitioner respectfully submits that because of the apparent conflict between Circuits in interpreting Section 1952 and because of the substantial question that exists as to the meaning of the statute this Honorable Court should grant this petition for Writ of Certiorari so that a final determination of these important questions can be had.

POINT IV.

THE GOVERNMENT SHOULD NOT BE ALLOWED TO INTRODUCE TAX RETURNS OF A DEFENDANT INTO EVIDENCE WHEN THERE HAS NOT BEEN A SHOWING THAT THE GOVERNMENT HAS COMPLIED WITH ITS OWN REGULATIONS CONCERNING HOW COPIES OF TAX RETURNS ARE TO BE OBTAINED.

The Tenth Circuit in its Opinion held that it was not error to allow Petitioner's Income Tax Return into evidence even though the government had not shown that it had complied with its regulation concerning how the Income Tax Return was to be obtained. The Court stated on Page 8 of its Opinion as follows:

> ". . . The probative value of the returns as evidence in a Court Room is neither enhanced nor diminished by compliance with the regulation. . . ."

This holding of the Tenth Circuit seems to conflict with the rule that has been applied in constitutional cases requiring that prosecuting officials comply with the law in their endeavors to force it. See Elkins v. U.S., 364 U.S. 206, 80 S. Ct. 1437 (1960), the question here presented is whether the government can use evidence when it did not show that it has complied with its own regulations concerning how that evidence can be obtained. The Tenth Circuit does not really answer this question by saying that compliance with the regulation would not enhance or detract from the probative value of the evidence. This misses the point which is

important. Every defendant in a criminal case should be assured that the prosecuting officials obey the law, and every defendant in a criminal case has the right to be tried with evidence that is obtained by legal methods. This Court should consider this question because it is important to establish whether the government can violate or disregard its own regulations in carrying out criminal prosecutions.

POINT V.

THIS PETITIONER INCORPORATES QUESTIONS PRESENTED BY CO-PETITIONER, MICHAEL E. PAULDINO, WHOSE PETITION IS DUE AUGUST 30, 1971.

The Petitioner and Co-Petitioner, Michael E. Pauldino, were Co-Defendants in the trial court and were consolidated in the Tenth Circuit Court of Appeals for oral argument. Co-Petitioner has now obtained independent counsel who would have filed a single Petition for Writ of Certiorari with Petitioner but for Co-Petitioner's extension of time to August 30, 1971. Since counsel had agreed to divide the points to be covered, this Petitioner hereby requests that the Court consider the Petition for Writ of Certiorari of Michael E. Pauldino contemporaneously with the consideration of this Petition.

CONCLUSION

For these reasons, a Writ of Certiorari

should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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No. 71-165

Supreme
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JESS RAYMOND BRIDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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JESS RAYMOND BRIDWELL, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Colorado, petitioner and one Pauldino were convicted of having traveled from Colorado to Nebraska with intent to promote and carry on an illicit gambling enterprise, and with conducting that illegal activity, in violation of 18 U.S.C. 1952. The court of appeals affirmed (Pet. App.).

Petitioner's contentions are fully analyzed and answered in the opinion of the court below on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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